Public Bank Bhd v Nikseng Development Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-147 OF 1996
SHAIK DAUD, SITI NORMA YAAKOB AND MAHADEV SHANKAR JJCA
4 NOVEMBER 1996

Civil Procedure *— Want of prosecution — Striking out action for want of prosecution — Inordinate and inexcusable delay — Delay of three years eight months since the date of closure of pleadings — Whether delay had prejudiced respondent — Whether there was substantial risk that fair trial would not be possible — Rules of the High Court 1980 O 25 r 1(5)*

The appellant had filed an action against the respondent for the recovery of a sum of money on 25 October 1991. The respondent filed a defence and counterclaim. Pleadings closed on 19 March 1992. Pursuant to an order of the High Court dated 6 May 1996, the suit was consolidated with two other suits in which the respondent sued the appellant. The present solicitors for the appellant took over the conduct of the present case on 25 August 1994 from the previous solicitors. By a summons in chambers dated 27 July 1995, the respondent applied for the writ and statement of claim to be struck off for want of prosecution pursuant to O 25 r 1(5) of the Rules of the High Court 1980 ('the RHC'). The learned senior assistant registrar struck out the appellant's writ and statement of claim for want of prosecution. On appeal, the learned judge upheld the decision. The appellant appealed.

The appellant conceded that there was a delay of three years eight months since the date of closure of pleadings and that there was inordinate and inexcusable delay. However, the appellant argued that the power of the court to dismiss an action for want of prosecution should only be exercised not only where the court was satisfied that there had been inordinate and inexcusable delay on the part of the appellant or its solicitors but also that such delay would give rise to a substantial risk that it was not possible to have a fair trial or was such as was likely to cause serious prejudice to the respondent. It was submitted that in the circumstances of the case, the respondent had failed to prove this.

The main issue for consideration was whether such delay gave rise to a substantial risk that it would not be possible to have a fair trial or to have caused serious prejudice to the respondent. Another issue was whether the court ought to interfere in this case with the exercise of judicial discretion by the senior assistant registrar and judge.

Held, allowing the appeal:

(1) There was sufficient evidence to show that the delay as occasioned in this case would not likely give rise to a substantial risk that a

fair trial would not in all probability be held. In the circumstances of the case, such delay would also not occasion serious prejudice to the respondent (see p 106A). A

(2) The decision of the senior assistant registrar in allowing the application by the respondent to strike out the appellant's action and upholding the decision of the learned judge was an exercise of judicial discretion — a matter rarely interfered with by an appellate court. However, in appropriate cases the appellate court should and would interfere where it could be seen clearly that the decision was wrong. On the facts, it would be justified in this case for the court to interfere and reverse the judge's decision (see p 105E–F); *Ward v James* [1965] 1 All ER 563 followed. B C

[Bahasa Malaysia summary

Perayu telah memfailkan tindakan terhadap penentang untuk mendapat kembali sejumlah wang pada 25 Oktober 1991. Penentang telah memfailkan pembelaan dan tuntutan balas. Pliding telah tutup pada 19 Mac 1992. Menurut suatu perintah Mahkamah Tinggi bertarikh 6 Mei 1996, guaman ini telah digabungkan dengan dua tindakan lain di mana penentang telah mendakwa perayu. Peguamcara kini untuk perayu telah mengambil alih kes ini pada 25 Ogos 1994 dari peguamcara dahulu. Melalui saman dalam kamar bertarikh 27 Julai 1995, penentang telah memohon supaya writ dan pernyataan tuntutan dibatalkan kerana ketiadaan pendakwaan menurut A 25 k 1(5) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Penolong kanan pendaftar yang arif telah membatalkan writ perayu dan pernyataan tuntutan kerana ketiadaan pendakwaan. Atas rayuan, hakim yang arif telah mengekalkan keputusan tersebut. D E F

Perayu telah bersetuju bahawa terdapatnya kelengahan selama tiga tahun lapan bulan sejak tarikh ketutupan pliding dan bahawa terdapatnya kelambatan yang sengaja dan yang tidak dapat dimaafkan. Walau bagaimanapun, perayu telah berhujah bahawa kuasa mahkamah untuk menolak tindakan kerana ketiadaan pendakwaan harus hanya dilaksanakan bukan sahaja di mana mahkamah puas hati bahawa terdapatnya kelambatan yang sengaja dan yang tidak dapat dimaafkan di pihak perayu ataupun peguamcaranya tetapi juga bahawa kelambatan tersebut akan menimbulkan risiko besar di mana adalah tidak mungkin untuk mengadakan perbicaraan yang adil ataupun ianya akan mengakibatkan kemudaratan yang serius kepada penentang. Telah dihujahkan bahawa dalam keadaan kes, penentang telah gagal membuktikan ini. G H

Isu utama untuk dipertimbangkan adalah sama ada kelambatan tersebut telah menimbulkan risiko yang besar di mana adalah tidak mungkin mengadakan perbicaraan yang adil atau bahawa ianya telah mengakibatkan kemudaratan yang serius kepada penentang. Satu lagi isu adalah sama ada mahkamah harus campurtangan dalam kes ini dalam pelaksanaan budi bicara oleh penolong kanan pendaftar dan hakim. I

Diputuskan, membenarkan rayuan:

(1) Terdapat keterangan yang mencukupi untuk menunjukkan bahawa kelambatan seperti yang berlaku dalam kes ini tidak mungkin mengakibatkan risiko yang besar di mana suatu perbicaraan yang adil tidak akan diadakan. Dalam keadaan kes ini, kelambatan tersebut juga tidak akan mengakibatkan kemudaratan yang serius kepada penentang (lihat ms 106A).

(2) Keputusan penolong kanan pendaftar dalam membenarkan permohonan oleh penentang untuk membatalan tindakan perayu dan mengekalkan keputusan hakim adalah pelaksanaan budi bicara — suatu perkara yang jarang diganggu oleh mahkamah rayuan. Walau bagaimanapun, dalam kes yang wajar, mahkamah rayuan harus dan akan mengganggu di mana adalah jelas di mana keputusan adalah salah. Atas fakta, adalah berjustifikasi dalam kes ini untuk mahkamah mengganggu dan mengubah keputusan hakim (lihat ms 105E–F); *Ward v James* [1965] 1 All ER 563 diikut.]

Notes

For a case on striking out for want of prosecution, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3649–3655.

Cases referred to

Ladd v Marshall [1954] 3 All ER 745 (refd)
Ward v James [1965] 1 All ER 563 (folld)

Legislation referred to

Rules of the High Court 1980 O 25 r 1(5)

Appeal from: Civil Suit No D2–22–1427 of 1991 (High Court, Kuala Lumpur)

Yeoh Chong Kong and *Chua Eng Siong* (*Iza Ng Yeoh & Kit*) for the appellant.

K Ramesh and *Roy Sreenivasan* (*KK Chong Chai & Koo*) for the respondent.

Shaik Daud JCA (delivering the judgment of the court): This appeal was from the decision of the High Court, Kuala Lumpur which had upheld the decision of the senior assistant registrar to strike out the appellant's writ and statement of claim for want of prosecution.

The appellant had filed an action against the respondent for the recovery of RM6,395,763.02 plus interest on 25 October 1991. The respondent, in turn, filed a defence and counterclaim. Pleadings closed on 19 March 1992. Pursuant to an order of the High Court dated 6 May 1996, this suit was consolidated with two other suits in which the respondent herein had sued the appellant. The present solicitors for the appellant took over the conduct of the present case on 25 August 1994 from the previous solicitors, Chooi & Co. By a summons in chambers dated 27 July 1995,

the respondent applied for the writ and statement of claim to be struck off for want of prosecution pursuant to O 25 r 1(5) of the Rules of the High Court 1980. The appellant conceded that there was a delay of some three years and eight months since the date of the closure of pleadings. The appellant also conceded that there was inordinate and inexcusable delay. It was submitted on behalf of the appellant that the power of the court to dismiss an action for want of prosecution should only be exercised not only where the court was satisfied that there had been inordinate and inexcusable delay on the part of the appellant or its solicitors but also where such delay would give rise to a substantial risk that it was not possible to have a fair trial or is such as was likely to cause serious prejudice to the respondent. It was submitted that in the circumstances of this case, the respondent had failed to prove this.

Since the appellant had conceded that there was inordinate and inexcusable delay in prosecuting this case, there was therefore no need for us to go into that. The only question to be decided was whether such delay gave rise to a substantial risk that it was not possible to have a fair trial or to have caused serious prejudice to the respondent.

The pleadings show that the respondent had been a long time customer of the appellant bank and on that premise, the appellant had afforded loan facilities to the respondent up to an aggregate of some RM6m. In consideration of these facilities, the respondent executed a debenture in favour of the appellant and as collateral, the respondent had charged several lots of land to the appellant and a letter of guarantee was executed by three directors of the respondent. From all these, it cannot be gainsaid that in an action of this nature, a substantial part of the appellant's case, if not the entire case, rested on documentary evidence. Therefore, witnesses will play an insignificant part. In this respect, the appellant in their various affidavits had consistently averred that all the relevant documents pertaining to their claim were available.

As for the directors who executed the guarantee, the respondent in its affidavit in support of the summons in chambers dated 8 August 1995 affirmed by one Hon Fah Tai, averred that one Mr Nik Che Kok had resigned from the respondent company in 1987 and had accordingly disposed of his shares in the company and for the past four years was living in either England or Ireland and could not be traced. Apparently another key witness, one Mr Goh Poh Seng did not possess any more shares in the respondent company and his whereabouts were unknown.

The affidavit in reply affirmed on 2 November 1995 by one Looi Kam Thin, a branch manager of the appellant bank, disclosed facts substantially contrary to the averments of Hon Fah Tai. It was disclosed that both these witnesses are still part of the respondent company and are available to be called as witnesses, if necessary. In the case of Mr Nik Che Kok, the alter ego of the respondent at the material time, he was in fact present in the High Court, giving evidence on behalf of the respondent in another trial in which the respondent had sued the appellant vide Civil Suit No S7–22–316 of 1989 (Kuala Lumpur). He was present on three

dates, ie 17 April 1996, 17 July 1996 and 3 September 1996. It would appear that the facts of the respondent's claim against the appellant in Civil Suit No S7–22–316 of 1989 and the facts in the present action are substantially the same. The respondent had served the affidavit verifying the list of documents of Hon Fah Tai, affirmed on 19 July 1994 and the list of documents dated 19 July 1994 on the appellant. It was categorically stated in the list of documents that the documents listed therein were in the respondent's possession, custody or power. This had not been denied by the respondent. In the light of this, surely the respondent could not now be heard to say that most of the documents were missing. It seems clear that when it appeared to be to their advantage, the respondent claimed that all the relevant documents were in their possession but when it appeared to be not to their advantage, they claimed the documents were not available. The respondent ought not to be allowed to blow hot and cold on this matter. As for another director, Mr Goh Poh Seng, the same affidavit of Looi Kan Thim disclosed that the latest records of the Registrar of Companies vide letter dated 1 February 1994 showed that he was still the director of the respondent. It also disclosed that Goh Poh Seng & Sons had substantial shareholding in the respondent company. In the light of this, it is our view that the inordinate delay in this case, would not likely give rise to a substantial risk that it would not be possible to have a fair trial and that such delay would not, in all probability, occasion serious prejudice to the respondent.

We recognize the decision of the learned senior assistant registrar in allowing the application by the respondent to strike out the appellant's action and upholding the decision of the learned judge is an exercise of judicial discretion — a matter rarely interfered with by an appellate court. In appropriate cases, however, the appellate court should and would interfere where it could be seen clearly that the decision was wrong. In this respect, we refer to what Lord Denning said in *Ward v James* [1965] 1 All ER 563 at p 570:

> ... this court can, and will, interfere if it is satisfied the judge was wrong. Thus it will interfere if it can see that the judge has given no weight (or insufficient weight) to those considerations which ought to have weighed with him ... .

Our perusal of the records of appeal showed that while the learned judge placed very great weight and consideration on the contents of the various affidavits filed on behalf of the respondent, he seemed to have given no weight at all or no sufficient weight to the contents of the affidavits filed on behalf of the appellant. For instance, the learned judge gave weight to the averment about the difficulty of tracing the witness Nik Che Kok but failed to give any weight at all to the reply by the appellant. The learned judge also failed to give any weight to the averments on behalf of the appellant on the issue of the list of documents provided by the respondent which showed that those documents were in fact available. In the light of this, we feel that this is one of the instances where it would be justified for this court to interfere and reverse the learned judge's decision.

It is our view that there was sufficient evidence — some of which was unchallenged — to show that the delay, as occasioned in this case, would not likely give rise to a substantial risk that a fair trial would not in all probability be held. In the circumstances of this case, we are also of the view that the delay would not occasion serious prejudice to the respondent.

At the outset of this appeal, we considered a motion by the appellant to adduce fresh evidence, which evidence was unavailable at the High Court hearing on 15 February 1996 as the event mentioned therein had not transpired then. We allowed the motion on the principle in *Ladd v Marshall* [1954] 3 All ER 745.

For this reason, we allowed the appeal, set aside the decisions of the learned senior assistant registrar and that of the learned judge but we made no order as to costs as we are mindful of the appellant's admission that there had been inordinate delay on their part to prosecute their claim. We also ordered that the deposit be refunded.

Appeal allowed.

Reported by Mariette Peters-Goh